FCC 95-272

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 93-179

In the Matter of

Price Cap Regulation of
Local Exchange Carriers

Rate-of-Return Sharing
and Lower Formula Adjustment

ORDER

Adopted: June 29, 1995 **Released:** June 30, 1995

By the Commission:

I. Introduction

1. On March 30, 1995, the Commission adopted a rule explicitly incorporating an "add-back" adjustment into the local exchange carrier (LEC) price cap rules.[1] On April 28, 1995, the Ameritech Operating Companies (Ameritech) requested an emergency stay of the effectiveness of the add-back requirement, pending disposition of its petition for review of the *Add-Back Order* to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals).[2] On May 9, 1995, Bell Atlantic and Southwestern Bell Telephone Company (SWB) requested that the Commission stay the *Add-Back Order*, pending disposition of Bell Atlantic's petition for review of the *Add-Back Order* to the Court of Appeals.[3] MCI Telecommunications Corporation (MCI) and AT&T

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[1] Price Cap Regulation of Local Exchange Carriers, Rate-of-Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179, FCC 95-133 (released: Apr. 14, 1995) (*Add-Back Order*).

[2] Ameritech Emergency Motion for Stay Pending Judicial Review (Ameritech Motion); Ameritech Operating Companies v. F.C.C., Petition for Review, Docket No. 95-1239 (D.C. Cir. Apr. 28, 1995).

[3] Bell Atlantic and SWB Joint Petition for a Partial Stay and for Imposition of an Escrow or Accounting Mechanism Pending Judicial Review (Bell Atlantic and SWB Petition); Bell Atlantic v. F.C.C., Petition for Review, Docket No. 95-1245 (D.C. Cir. May 2, 1995).

Corp. (AT&T) filed oppositions to the Ameritech Motion.[4] MCI also filed an untimely opposition to the Bell Atlantic and SWB Petition.[5]

2. For the reasons set forth below, we find that Ameritech has not shown that it is entitled to the requested relief under our well-established standards. We also find that Bell Atlantic and SWB have failed to establish that they are entitled to the requested relief. We, therefore, deny both Ameritech's motion for stay, and Bell Atlantic's and SWB's joint petition for stay.[6] Before we discuss the merits of the two stay petitions, we first address several procedural issues.

II. Procedural Issues

3. MCI filed its opposition to the Bell Atlantic and SWB Petition one day after the specified date of May 16, 1995.[7] In support of its motion to accept its late-filed opposition , MCI suggests that "[t]here is some conflict" as to whether Section 1.4(h) of the Commission's Rules,[8] applies for purposes of the due date for filing oppositions to stay requests.[9] In addition, MCI claims that the one-day "delay will [not] prejudice parties

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[4] Opposition of MCI to Emergency Motion for Stay Pending Judicial Review (filed May 6, 1995) (MCI Opposition); AT&T Opposition to Stay (filed May 5, 1995) (AT&T Opposition).

[5] Opposition of MCI Telecommunications Corporation to Joint Petition for Stay Pending Judicial Review (filed May 17, 1995) (MCI Late-filed Opposition.

[6] Bell Atlantic and SWB also request that the Commission stay in part its Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, FCC 95-132 (adopted: Mar. 30, 1995; released: Apr. 7, 1995) (*LEC Price Cap Performance Review*). Bell Atlantic and SWB Petition at 1. The Commission will address Bell Atlantic's and SWB's petition for a partial stay of the *LEC Price Cap Performance Review* in a separate order.

[7] MCI Motion to MCI Late-filed Opposition (MCI Motion) at 1-2; *see also* Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d) ("Oppositions to a request for stay . . . shall be filed within 7 days after the request is filed. . . .").

[8] 47 C.F.R. § 1.4(h).

[9] MCI Motion at 2 n.2; *see also* Section 1.4(h) of the Rules (in general, provides parties an additional three days to respond to a pleading if the filing period for responding to the pleading is 10 days or less, and if the party has been served by mail).

since reply comments on stay motions may not be filed."[10]

4. Section 1.45(d) of the Rules clearly states that "[t]he provisions of [Section] 1.4(h) shall not apply in computing the filing date for oppositions to a request for stay . . . ."[11] We therefore reject MCI's suggestion that our rules are not sufficiently clear as to the due date for filing oppositions to a stay request. We also reject MCI's statement that the one-day delay in filing its opposition will not prejudice other parties because replies cannot be filed. The Commission shortened the filing period for oppositions to requests for stay and other requests for temporary relief and precluded the filing of replies to such oppositions "[i]n view of [parties'] need for prompt action on [such] requests . . . ."[12] For these reasons, we reject MCI's motion to accept its late-filed opposition and we dismiss its late-filed opposition.

5. On May 15, 1995, and May 17, 1995, respectively, Ameritech and Bell Atlantic filed replies to MCI's and AT&T's oppositions. Section 1.45(d) of the Commission's Rules,[13] provides that "[r]eplies to oppositions [to a request for stay of any order] should not be filed and will not be considered." Neither Ameritech nor Bell Atlantic has made a showing as to why the Commission should waive its rules to allow the filing of their replies. Accordingly, we dismiss the replies of Ameritech and Bell Atlantic and, pursuant to Section 1.45(d) of the Rules, we will not consider the arguments raised in those replies.

III. Background on Add-Back Requirement

6. Under the Commission's original system of price cap regulation, LECs whose interstate earnings in a calendar year exceed specified benchmarks were required to share with ratepayers part or all of the earnings above the benchmarks.[14]

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[10] MCI Motion at 2.

[11] *See also* Amendment of Section 1.45(d) of the Commission's Rules, 4 FCC Rcd 5585, 5585 (1989) ("the three additional days when service is by mail [under Section 1.4(h)] does not apply to oppositions to a request for stay . . . .").

[12] Amendment of Parts 0 and 1, Rules and Regulations, 12 FCC2d 859 (1968).

[13] 47 C.F.R. § 1.45(d).

[14] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786, 6801-02 (1990) (*LEC Price Cap Order*), *on recon.*, 6 FCC Rcd 2637, 2686 (1991) (*LEC Price Cap Reconsideration Order*), *aff'd sub nom.*, National Rural Telecom

The revisions to the price cap plan adopted by the Commission in March 1995 continue the sharing requirement for LECs that select the two lower X-Factors.[15] This sharing is accomplished through a one-time (non-permanent) reduction in their price cap indices (PCI) at the next annual access tariff filing.[16] The price cap rules also permit LECs whose earnings fall below a specified low-end benchmark during the calendar year to make a (non-permanent) one-time upward adjustment to their price cap indices at the next annual filing.[17] The upward adjustment is intended to permit the LEC to raise its interstate rates to levels that will enable the LEC to increase its interstate earnings to the low-end benchmark.[18] This procedure is known as the low-end adjustment mechanism.

7. In the *Add-Back Order*, the Commission amended the price cap rules to include an express requirement that price cap LECs make an "add-back" adjustment when calculating earnings used to determine sharing and low-end adjustments for a year that follows a year in which a LEC incurred a sharing obligation or made a low-end adjustment. An "add-back" adjustment eliminates the effects of sharing or low-end adjustments incurred on the LEC's current year's earnings. The "add-back" process requires a price cap LEC to add an amount equal to the sharing adjustment amount to its current year revenues before calculating a LEC's rate of return for the current year. If a low-end adjustment was made in the prior year, the amount of the adjustment is subtracted from the current year's revenues before computing earnings for the current year. The current year's earnings, thus adjusted, determine whether sharing is required, or a low-end adjustment is permitted, in the next tariff year.[19]

8. In the *Add-Back Order*, the Commission found that the add-back adjustment is a necessary component of the sharing and low-end adjustment mechanisms because it ensures that the earnings thresholds applied to determine the price cap LECs' sharing and low-end adjustments are those the Commission intended when it adopted these mechanisms. The Commission determined that an add-back adjustment ensures that the sharing and low-end

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Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[15] *LEC Price Cap Performance Review* at paras. 19-20.

[16] *LEC Price Cap Order*, 5 FCC Rcd at 6801.

[17] *Id.* at 6788; *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2691 n.166.

[18] *LEC Price Cap Order*, 5 FCC Rcd at 6788.

[19] *Add-Back Order* at paras. 4, 13-14, 56.

adjustment mechanisms operate as one-time adjustments as the Commission intended when it adopted the LEC price cap plan.[20]

9. The Commission held that the explicit add-back rule would apply only on a prospective basis and, therefore, would first be applied in the carriers' 1995 annual access tariff filings.[21] In determining the adjustments to their price cap indices for the 1995-96 tariff year, LECs are required to compute their 1994 interstate earnings on the basis of the add-back rule.[22]

IV. Summary of Pleadings

10. Ameritech, Bell Atlantic, and SWB (collectively, petitioners) contend that they are entitled to a stay of the effectiveness of the add-back requirement under the four-part test that has been applied by the courts and this Commission.[23] First, they claim that they are likely to prevail on the merits of their appeals of the *Add-Back Order* to the Court of Appeals. Ameritech asserts that the *Add-Back Order* constitutes retroactive rulemaking because it requires "the 'add-back' of sharing to evaluate earnings that took place before the effective date of the order."[24] Bell Atlantic and SWB maintain that the add-back rule, by requiring the "add-back of sharing obligations incurred two years past," constitutes impermissible retroactive rulemaking under *Bowen v. Georgetown University Hospital*, 488 U.S. 204

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[20] *Id.* at para. 56.

[21] *Id.* at para. 49; *see also* 1995 Annual Access Tariffs, United States Telephone Association Application for Waiver, DA 95-494 (Com. Car. Bur., adopted: Mar. 15, 1995; released: Mar. 16, 1995) (permitting the price cap LECs to file their 1995 annual access tariffs on May 9, 1995, and establishing an Aug. 1, 1995 effective date for these tariffs); Cost Support Material to be Filed with 1995 Annual Access Tariffs, 1995 Annual Access Tariffs, United States Telephone Association Application for Waiver, DA 95-823 (Com. Car. Bur., adopted and released Apr. 14, 1995).

[22] *Add-Back Order* at para. 49.

[23] Ameritech Motion at 2 (*citing* Storer Communications, Inc., 101 F.C.C.2d 434 (1985) and Washington Metropolitan Area Transit Comm'n v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977) (*Washington Metropolitan*)); Bell Atlantic and SWB Petition at 7 (*citing Washington Metropolitan*).

[24] Ameritech Motion at 3.

(1988).[25]

11. Ameritech asserts that the Commission based its decision in the *Add-Back Order* "on its opinion that sharing under price caps operates essentially the same as a refund under rate of return regulation."[26] Ameritech maintains that such a view of the sharing adjustment mechanism "is legally unsustainable" because the Commission lacks the authority to compel a refund of earnings absent a finding that the earnings are unlawful.[27] Ameritech claims that it is illogical to argue that the sharing mechanism requires the refund of unlawful earnings "because only 50 percent of the 'overearnings' are refunded."[28] Ameritech contends that the sharing mechanism is effectively a forward-looking adjustment to the LEC's productivity offset requiring the LEC "to share th[e] productivity gain with customers."[29] Therefore, Ameritech avers, it is arbitrary and capricious for the Commission to require that the effects of a sharing adjustment "be ignored when calculating the carrier's earnings for the subject year."[30]

12. Second, petitioners argue that they will suffer certain and irreparable harm if we do not grant their stay requests.[31] Ameritech claims that the add-back rule requires LECs to "'return' substantial sums that were lawfully obtained."[32] Ameritech asserts that "once the [add-back adjustment is] memorialized in the carrier's tariff, it is not at all clear that the Commission will permit carriers to recover those lost earnings" in the event that the Court of Appeals overturns the

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[25] Bell Atlantic and SWB Petition at 5, 21-22.

[26] Ameritech Motion at 2 (*citing Add-Back Order* at paras. 23, 32, 41).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 3.

[30] *Id.*

[31] Ameritech Motion at 4; Bell Atlantic and SWB Petition at 6; *see also id.*, Declaration of Howard F. Zuckerman at 5 (claiming that "for the first year alone, the add-back requirement will produce [for Bell Atlantic] an incremental revenue reduction of $17.4 million").

[32] Ameritech Motion at 4.

add-back requirement.[33] Bell Atlantic and SWB aver that, if the *Add-Back Order* is reversed, competition in the interstate access services market may make it impossible for them to increase rates prospectively to recover revenues lost as a result of the add-back requirement.[34] They claim that any future price increases to compensate them for losses occasioned by the *Add-Back Order* will cause them to lose customers to their competitors.[35]

13. Third, petitioners contend that neither the public interest nor other parties would be harmed by a grant of their stay requests.[36] Ameritech claims that a stay would preserve the *status quo* and, therefore, "would not disturb any long-held expectations upon which carriers or the public have come to rely."[37] Bell Atlantic and SWB allege that a stay of the *Add-Back Order*, when coupled with an order requiring them either to account for or to place into escrow any funds collected as a result of the stay order, would allow for appropriate compensation to adversely affected parties in the event the Court of Appeals affirms the *Add-Back Order*.[38] Bell Atlantic and SWB contend that a stay of the *Add-Back Order* will not result in higher prices because competitive forces will cause the interexchange carriers to reduce their prices "to account for the anticipated recovery of any sums subject to the accounting order or placed in the escrow account."[39]

14. Finally, petitioners claim that a grant of their stay requests is in the public interest. Ameritech asserts that a stay is in the public interest because enforcement of the add-back requirement "may be felt in diminished quality of service to the public."[40] Bell Atlantic and SWB claim that a stay plus an

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[33] *Id.* at 4.

[34] Bell Atlantic and SWB Petition at 7, 23; *id.* at 7, 24 (asserting that competition in LEC interstate access service markets already limits the ability of LECs to raise their prices and that competition will have an even greater effect in the future).

[35] *Id.* at 7.

[36] Ameritech Motion at 4; Bell Atlantic and SWB Petition at 24-25.

[37] Ameritech Motion at 4.

[38] Bell Atlantic and SWB Petition at 24.

[39] *Id.* at 25.

[40] Ameritech Motion at 4.

accounting order or escrow mechanism will ensure the most "equitable distribution of compensation and costs."[41]

15. MCI and AT&T contend that Ameritech has failed to establish that it is entitled to a stay of the *Add-Back Order*.[42] MCI and AT&T assert that Ameritech will not prevail on the merits of its appeal of the *Add-Back Order* to the Court of Appeals.[43] MCI maintains that the *Add-Back Order* analogizes the operation of the sharing adjustment mechanism to a refund under rate-of-return regulation, but "does not say that sharing is a refund . . . ."[44] MCI argues that the add-back requirement does not constitute retroactive rulemaking because the impact of the requirement is on future rates.[45]

16. MCI further argues that Ameritech will not be irreparably harmed in the absence of a stay. MCI states that Ameritech has not demonstrated that the add-back requirement will affect the sharing obligations reflected in its 1995 rates.[46] Also, MCI maintains that, in the event Ameritech wins on appeal or the Commission modifies the add-back requirement, the effect of the add-back adjustment on Ameritech's rates can be corrected in its 1996 rates.[47] In addition, MCI and AT&T claim that a stay of the add-back requirement would harm the public interest by forcing ratepayers to incur higher access rates.[48]

V. Discussion

17. In determining whether to stay the effectiveness of an FCC order, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Jobbers*), as modified in *Washington Metropolitan*, 559 F.2d 841, 843. Under that test, petitioners must demonstrate that: (1) they are likely to succeed on the

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[41] Bell Atlantic and SWB Petition at 26.

[42] MCI Opposition at 1; AT&T Opposition at 2.

[43] MCI Opposition at 5; AT&T Opposition at 2-3.

[44] MCI Opposition at 5 (emphasis omitted); *accord* AT&T Opposition at 3.

[45] MCI Opposition at 6.

[46] *Id.* at 7.

[47] *Id.* at 8.

[48] *Id.* at 9; AT&T Opposition at 4.

merits on appeal;[49] (2) they would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. A petitioner must satisfy each of these tests in order to justify grant of a stay.

18. The petitioners have not met any of the four factors that must be satisfied to warrant a stay of our *Add-Back Order*. We need not address petitioners' arguments with respect to each of these factors, because they have clearly failed to demonstrate that they will suffer irreparable injury absent a stay of the add-back requirement and that a stay would serve the public interest. Ameritech's claim of irreparable harm rests on its assertion that it will be required to refund earnings in the 1995-96 tariff year and its speculation that the Commission might not permit Ameritech to recover those refunds if the Commission's order is overturned. Bell Atlantic's and SWB's claim of irreparable harm is based on their assertion that they will be required to refund earnings in the 1995-96 tariff year and on their speculation that, in the event the *Add-Back Order* is reversed, it might be impossible for them to increase rates prospectively to recover those refunds because, if they do, they will lose customers to competition.

19. Courts have held that economic loss, in and of itself, does not constitute irreparable harm for purposes of analyzing stay requests.[50] The *Jobbers* court, for example, concluded that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."[51] In this case, the petitioners have not demonstrated that they would be unable to recover "lost earnings"[52] resulting

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[49] The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioners' showing on the other factors is particularly strong. Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 123, 124 n.10 (1992) *(Expanded Interconnection)*.

[50] *Jobbers*, 259 F.2d at 925 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough"); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) *(Wisconsin Gas)*.

[51] *Jobbers*, 259 F.2d at 925.

[52] Ameritech Motion at 4.

from compliance with the add-back rule.[53] Ameritech's speculation that the Commission might not allow the price cap LECs to recover the amounts reflecting the add-back adjustment if the Court of Appeals overturned the *Add-Back Order* does not support a finding of irreparable harm.[54] Recent court decisions suggest that, where appropriate, the agency has discretion, consistent with the Filed Rate Doctrine and the rule against retroactive ratemaking, to consider whether it may be appropriate to permit relief to remedy the effects of an agency order that has been overturned on appeal.[55] In a similar vein, generalized assertions by Bell Atlantic and SWB that competition may prevent them from raising their rates in the future in the event our order is overturned falls well short of demonstrating that they would suffer irreparable harm, absent a stay.[56]

20. Further, we find that enforcement of the add-back adjustment is in the public interest. An add-back adjustment ensures that the sharing and low-end adjustment mechanisms operate as the Commission intended when it adopted the LEC price cap plan.[57] The sharing and low-end adjustment mechanisms were

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[53] *Wisconsin Gas*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("the injury must be certain and great; it must be actual and not theoretical . . . . the party seeking relief must show that '[t]he injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm'") (quoting Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976); *see also* Capital Network Systems, *Inc.*, 7 FCC Rcd 906, 907 (1992).

[54] *See, e.g., Jobbers*, 259 F.2d at 925 ("bare claims that if the court were ultimately to reverse and remand the case to the Commission, the latter would not provide the petitioners with an adequate hearing or permit it to develop the record successfully, can be given no credence [and do not support a finding of irreparable harm]"); *cf. Washington Metropolitan*, 559 F.2d at 843 (finding that the petitioner had demonstrated that in the absence of a stay, the petitioner would suffer irreparable harm "in the . . . destruction in its current form as a provider of bus tours").

[55] *See* Natural Gas Clearinghouse v. F.E.R.C., 965 F.2d 1066 (D.C. Cir. 1992); Public Utilities Commission of the State of California v. F.E.R.C., 988 F.2d 154 (D.C. Cir. 1993).

[56] *See, e.g., Expanded Interconnection*, 8 FCC Rcd at 125 (allegation that petitioner may lose customers to competitors is "far too speculative" to constitute irreparable injury).

[57] *Add-Back Order* at para. 56.

designed to ensure that the LECs and their customers share fairly the risks and rewards of future productivity gains.[58] We, therefore, reject Bell Atlantic's and SWB's contention that a grant of their stay request is in the public interest because it would provide the most "equitable distribution of compensation and costs."[59] Moreover, Ameritech offers no support or explanation for its bare claim that enforcement of the add-back requirement would undermine the quality of its service. Accordingly, we believe that the public interest would not be served by delaying the effectiveness of our *Add-Back Order*. For the foregoing reasons, we find that the petitioners have failed to sustain the heavy burden required to justify a stay of our *Add-Back Order*.

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[58] *LEC Price Cap Order*, 5 FCC Rcd at 6787.

[59] Bell Atlantic and SWB Petition at 26. As noted *supra*, Bell Atlantic and SWB contend that a stay of the *Add-Back Order* will not result in higher prices because competitive forces will cause the interexchange carriers to reduce their price "to account for the anticipated recovery of any sum subject to the accounting order or placed in the escrow account." Bell Atlantic and SWB Petition at 7; *see also supra* at para. 13. This contention is somewhat inconsistent with claims raised by Bell Atlantic immediately prior to the Commission's decision in the Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132 (adopted Mar. 30, 1995; released April 7, 1995). Specifically, Bell Atlantic challenged the assertion that the interexchange carriers flow through LEC access charge reductions to end-user customers. *See* Bell Atlantic *ex parte* filing in CC Docket No. 94-1 at 1 (dated March 23, 1995) (interexchange carriers' interests "are in pocketing the access reductions we provide"); *id.* at 4 (AT&T's suggestion that it flowed through all access charge reductions to end users is "wrong and misleading"). Bell Atlantic and SWB do not explain in their joint petition why interexchange carriers would be more likely to pass on anticipated access charge reductions than they would actual access charge reductions.

21. Accordingly, IT IS ORDERED that the emergency motion for stay filed by the Ameritech Operating Companies IS DENIED.

22. IT IS FURTHER ORDERED that the joint petition for stay filed by Bell Atlantic and Southwestern Bell Telephone Company IS DENIED.

23. IT IS FURTHER ORDERED that the motion to accept the late-filed pleading filed by MCI Telecommunications Corporation IS DENIED and the opposition to the joint petition for stay filed by MCI Telecommunications Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary